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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CG Docket No. 03-123 - Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities

CG Docket No. 13-24 - Misuse of Internet Protocol (IP) Captioned Telephone Service

Dear Secretary Dortch:

By this letter, IDT Telecom, Inc. ("IDT") urges the Commission to resolve the issues it raised in its Further Notice of Proposed Rulemaking[1] in the above-listed dockets, particularly the issue of securing cost recovery for intrastate IP Captioned Telephone Service ("IP CTS") from the intrastate jurisdiction.

In the FNPRM, the Commission presented the many reasons it initially chose to fund intrastate IP CTS from the Interstate TRS Fund and tentatively concluded that "the original reasons for having the Fund provide compensation for these calls may no longer exist."[2] The Commission also wrote:

> [A] primary underlying reason for the Commission's decision to have the Fund reimburse providers for the costs of VRS and IP Relay calls – upon which part of the rationale for doing the same for IP CTS calls is based – was the difficulty in ascertaining the location of calls made using IP transmissions. Insofar as calls associated with IP CTS are often made using the PSTN, we believe that IP CTS providers are able to ascertain the origination and destination of IP CTS calls in a

[1] *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123, Report and Order and Further Notice of Proposed Rulemaking (August 26, 2013) ("FNPRM*").*

[2] *Id.* at ¶137.

> manner that would allow for compensation for these calls to be billed to the states or the Fund, and seek comment on whether this assumption is accurate.[3]

Comments filed in response to the FNPRM indicate that the Commission's belief is correct. The comments opposing the transfer of responsibility for the oversight of and compensation for intrastate IP CTS to the states instead focus on fiscal, political and administrative issues, i.e., the disinterest and/or inability of the states to financially support and efficiently administer state programs.[4] These arguments – upon which IDT takes no position – fail to address IDT's core concern, namely, that the Commission was directed by Congress to implement a cost recovery methodology based on jurisdictional separations and it has failed to do so.

As the comments made and cited by Sorenson and Caption Call indicate, the states, consumers and the relay service providers themselves have become so comfortable with the current system and so paralyzed by the prospect of the Commission handing off responsibility to the states for management of intrastate IP CTS that any movement toward a lawful federal/state approach consistent with jurisdictional separations has effectively been foreclosed. With this understanding as our guide, IDT submits the following thoughts and suggestions as a means to ensure the continued availability of IP CTS nationwide (and from multiple providers), with cost recovery secured from the corresponding jurisdiction.

The Commission has the authority under 47 U.S.C. §225 to regulate the provision of and compensation for intrastate relay services *provided that* the services are funded from the intrastate jurisdiction. By extension, the Commission has the authority under 47 U.S.C. §225 to extend the Interstate TRS Fund contribution base to include intrastate revenue. Therefore, if the Commission is unwilling or unable to delegate the authority for funding intrastate IP CTS to the states, the Commission is compelled to implement rules and policies that ensure the recovery of costs of intrastate IP CTS from the intrastate jurisdiction.

When trying to understand the Commission's authority to regulate the provision of and compensation for intrastate relay services, we look to 47 U.S.C. §225. In looking at 47 U.S.C. §225, we must consider both what the statute *compels* and what it *allows*: these are very different things.

What does 47 U.S.C. §225 *compel*? The answer is straight forward: 47 U.S.C. §225 directs the Commission to ensure that interstate and intrastate relay services are available to the extent possible and in an efficient manner; requires that costs caused by intrastate relay services to be

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[3] *Id.* at ¶136.

[4] *See generally*, Comments of Sorenson Communications, Inc. and Caption Call, Inc. at 28-30 (November 4, 2013); Reply Comments of Sorenson Communications, Inc. and Caption Call, Inc. at 17 - 18 (December 4, 2013), *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123 (providing a summary of the states, consumers and service providers which oppose the states funding and administering intrastate IP CTS.

recovered by the intrastate jurisdiction and costs caused by interstate relay services to be recovered by the interstate jurisdiction; and mandates that the Commission shall certify, per certain guidelines, a state program intended to implement intrastate telecommunications relay services.

What does 47 U.S.C. §225 *allow*? The answer is expansive: in fact, it is more than sufficiently expansive to allow the Commission to expand the contribution base to include intrastate revenue. 47 U.S.C. §225 allows the Commission to regulate the provision of and compensation for intrastate relay services. 47 U.S.C § 225 (b)(2) reads in full:

> Use of general authority and remedies
>
> For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

It is particularly noteworthy that 47 U.S.C § 225 also directs the Commission to prescribe regulations that "generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction." Thus, Congress provided the FCC with explicit, expansive authority over the provision of and recovery for intrastate relay services – the sole restriction being that recovery must be consistent with jurisdictional separations.

As well as the aforementioned explicit provision, 47 U.S.C. §225 implicitly allows for the FCC to regulate the provision of and recovery for intrastate relay services. This implicit authority is established by the fact that there is nothing in the statute which compels the states (or the Commission) to establish state programs to administer intrastate relay services. To be clear: the establishment of a state program to manage the provision of and recovery for one or more intrastate relay services is voluntary. 47 U.S.C. §225(f)(1) refers to states "desiring" to establish a state program under the statute. 47 U.S.C. §225 does not *compel* states to establish a state program. That (to the best of IDT's knowledge) all states have chosen to establish programs to manage the provision of and recovery for intrastate relay service is a demonstration of the states "desire" to do so. That states have established programs to administer intrastate relay services is simply a matter of fact: it is not a matter compelled by legislation.

With this understanding, we must conclude that a state's failure to establish a program for the oversight of and compensation for intrastate IP CTS is a demonstration of its desire to *not*

establish a program. And in the absence of state action to establish a program for the oversight of and compensation for intrastate IP CTS, the obligation falls to the Commission, consistent with its obligation to ensure that interstate and intrastate relay services are available to the extent possible and in an efficient manner, to establish such a program and to implement regulations that oversee the management of the service(s). Which the FCC has done.

To take this reasoning one step further, there is nothing in the statute which prevents *some* intrastate relay services from being administered via a state program while *other* intrastate services are administered by the FCC. Indeed, the Commission has, by its own admission, administered the provision of and compensation for intrastate IP CTS (as well as VRS and IP Relay) and if it does not have the authority to administer intrastate relay services then it has been in violation of the statute for 15 years. Congress specifically granted the FCC the authority to act in the most efficient manner, leaving the determination of what that "most efficient manner" is to the FCC's discretion. Thus, the Commission can continue to administer and compensate intrastate and interstate IP CTS while state programs can continue to administer and compensate the intrastate components of services presently under their authority if the Commission deems this approach to be the most efficient manner to make intrastate and interstate relay services available.

But what the FCC has *not* done is taken the next logical (and in IDT's opinion), mandatory step: securing compensation for the intrastate services overseen by the FCC and the Interstate TRS Fund in a manner consistent with the ADA. For, while the FCC has the broad authority to implement relay services in the most efficient manner, it has much more narrow authority to financially support those programs: its authority is constrained by the mandate to implement jurisdictional separations. Jurisdictional separations are not a choice - they are a mandate. And while excluding intrastate revenue from the contribution base of the Interstate TRS Fund was reasonable when the Fund was established (because state programs were established to oversee the compensation of available intrastate relay services), excluding intrastate revenue makes no sense (and is, in fact, in violation of Section 225) now that the Interstate TRS Fund is used to compensate intrastate IP CTS and other intrastate IP-based relay service calls.

The cost of funding intrastate IP CTS from the Interstate TRS Fund is great. CY 2013 data made publicly available[5] by Rolka Loube, the Interstate TRS Fund Administrator, and data contained in the Rolka Loube's "Payment Formula and Fund Size Estimate" for the 2014-2015 Calendar Year,"[6] indicate that 76.98% of compensable, conversation CTS minutes in CY 2013 were

[5] See the "Fund Status Reports" listed for April 2013 – March 2014 (these Reports represent minutes incurred in January – December 2013) at http://www.rolkaloube.com/#!formsreports/c1zvl (last viewed August 26, 2015). Note that data for the reporting periods June 2014 – December 2014 (reporting minutes generated in April – October 2014) was not available from the website; as a result IDT has chosen to use 2013 data. We believe that the 2014 information, when made available by Rolka Loube will not be meaningfully different than the 2013 data but we encourage its availability and use in generating estimates of intrastate/interstate relay service usage.

[6] http://apps.fcc.gov/ecfs/comment/view?id=6017614193 (last viewed August 26, 2015.)

intrastate.[7] The Fund Status Reports and additional data in the "Payment Formula and Fund Size Estimate" indicate that 79.45% of Traditional TRS minutes were intrastate and 71.03% of compensable conversation STS minutes were intrastate.[8] This data strongly indicates that a comparable percentage - 75% - of all IP CTS is intrastate. Given that the Commission has approved $445,611,574[9] in projected payments for IP CTS for the 2015-2016 Funding Year, this means that the 2015-2016 Funding Year budget contains $334,208,680[10] for the compensation of intrastate IP CTS. This figure is stunning, particularly given the FCC's failure to implement jurisdictional separations and secure the recovery of costs for intrastate IP CTS from the intrastate jurisdiction.

Which brings us back to Section 225. A compensation mechanism for intrastate calls can *only* be implemented if it is consistent with 47 U.S.C. §225, i.e., it must be consistent with jurisdictional separations.

There are two basic components of jurisdictional separations for relay services: separating compensable calls (i.e., the costs) by jurisdiction and separating by jurisdiction the revenue to support the funding of those calls. The revenue has already been separated: contributors' revenue is reported on the 499-A by jurisdiction – intrastate, interstate and international. And while the format of the 499-A would likely need to be altered to allow for intrastate revenue to be included within the Interstate Fund's contribution base, the alteration is editorial and not substantive.

The larger "issue" is the separation of compensable relay service calls by jurisdiction: this is a somewhat more complicated issue. Relay service providers, in order to be compensated, are required to provide call data information per 47 CFR Section 64.604(c)(ii)(D)(2)(i)-(x); this information should allow the Commission to identify the jurisdiction of calls and, by extension, allow for the Commission to compensate relay service calls from a pool drawn from the corresponding jurisdiction's revenue. IDT asserts that simply by separating calls into their jurisdictional "bucket" based on the information reported per 47 CFR Section 64.604(c)(ii)(D)(2)(i)-(x), the FCC would know the jurisdiction of compensable calls and, by extension, could allow for the calls to be compensated by funds drawn by the corresponding jurisdiction.

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[7] See Exhibit 1-2 of the Payment Formula and Fund Size Estimate for the 2014-2015 Calendar Year at http://apps.fcc.gov/ecfs/document/view?id=7521100847 (last viewed August 26, 2015.)

[8] See Exhibit 1-1 of the Payment Formula and Fund Size Estimate for the 2014-2015 Calendar Year at http://apps.fcc.gov/ecfs/document/view?id=7521100846 (last viewed August 26, 2015.)

[9] The FCC approved a Projected Requirement of $363,743,242 for IP CTS for the 2015-2016 Funding Year as well as a two average month provider Payment Reserve. Since the IP CTS projected payments represent 39.62% of the Projected Provider Payments, we attribute 39.62% of the $160,685,000 Payment Reserve, or, $63,663,397 to the overall projected payments for IP CTS. This figure, when added to the Projected Requirement, leads to a total of $445,611,574.

[10] This figure is derived by multiplying $445,611,574 by .75.

IDT understands that, in practice, the apportionment of calls by jurisdiction is not as simple as it would appear to be. This is of grave concern to IDT as it is unclear if relay service providers are being compensated when they fail to provide some of the required information. We urge the Commission to investigate this issue further. IDT's puzzlement aside, IDT recognizes that if, in fact, the jurisdiction of calls is not as readily available, the FCC can and should consider alternatives to determining jurisdiction. Determining jurisdiction could be done by undertaking traffic studies, implementing default percentages and/or other means. The Commission could, for example, look at the percentage of intrastate CTS minutes relative to the reported interstate/international CTS minutes and apply the same ratio to IP CTS minutes. As noted above, available data indicates that 76.98% of all CTS conversation minutes are intrastate. Unlike other instances in which the Commission has implemented default ratios (e.g., the application of USF to Interconnected VoIP and wireless service) where the mischaracterization of a call's jurisdiction could lead to different regulatory fee obligations, in applying a default percentage to IP CTS, relay service providers would have no incentive to weigh calls toward one jurisdiction over the other since the calls would be compensable regardless.

Moreover, IDT does not believe the use of certain well-reasoned, reasonable estimates runs afoul of the Commission's jurisdictional separations obligations provided that the jurisdiction of the call is unknown and cannot be determined even when the provider is in full compliance with the Commission's rules.[11] The language compelling jurisdictional separations contains the modifier "generally" and we believe this allows the Commission some rational flexibility, allowing the Commission to implement a cost recovery methodology pursuant to which jurisdictional separations need not be down to the penny. Indeed, for the purpose of separating administrative and other costs which comprise a part of the overall Interstate TRS Fund (and corresponding contribution factor), apportioning such costs in a manner other than a "general" one is not possible.

So if the Commission has the authority to extend the contribution base to include intrastate revenue, the only question remaining is if doing so is beneficial. The answer to that inquiry is a resounding "Yes."

The benefits of extending the contribution base to intrastate revenue to support intrastate IP CTS are great and many. First, it allows the FCC to finally implement a contribution methodology consistent with the ADA. Second, it provides a degree of stability to the Interstate TRS Fund, which in its present state is vulnerable to legal challenge and has seen its contribution base diminish greatly over the last decade – from approximately 81 billion for the 2004-2005 Year to 64 billion for the 2015-2016 Year.[12] Third, it ensures that existing (and future) IP CTS providers will be confident that they will be compensated at one rate, consistent throughout the country. Fourth, it ensures that IP CTS users will have no disruption of service

[11] IDT notes that if this is the case, the Commission should determine whether revision of its rules will result in a more exact result. Default percentages should be a last result – not a first option.

[12] *See* http://media.wix.com/ugd/455e4d_15bfc799fecd40e28fa9ef1644e39f10.pdf and http://apps.fcc.gov/ecfs/comment/view?id=60001030712 (last viewed August 26, 2015.)

and no change in service providers. Fifth, it allows for interstate and international service providers to be relieved of the burden of supporting intrastate IP CTS. And finally, it allows for the customers of interstate and international providers to be relieved of the burden of financing intrastate IP CTS placed upon them as well.

There are more compelling reasons for the Commission to retain oversight of existing intrastate IP CTS. Efficiency is sure to be greater having the service managed by the FCC, rather than by each individual state. Of far greater concern than simply efficiency is the concern that that if states "desired" to not oversee the management of one or more service, either the intrastate component of the service would not be available within the state (which would seemingly violate Section 225's mandate that intrastate service be made available) or the FCC would be compelled to manage the service(s) pursuant to its statutory obligation to ensure that interstate and intrastate relay services are available to the extent possible and in an efficient manner. Indeed, the mandate to administer in an efficient manner places another arrow in the Commission's quiver. Quite simply, it would inefficient – if not impossible – to have the intrastate component of a relay service administered by some states and not others while maintaining any semblance of jurisdictional separations.

Additionally, if states were to administer IP CTS, users would be harmed by the lack of competitive choice. It is IDT understands that states generally award a contract to one provider to provide a particular relay service whereas the FCC allows multiple service providers operating within the same state to be compensated. So, if a particular state chose to manage the intrastate component of IP CTS, by selecting one provider for the intrastate component of the service, it would effectively ban all competitors from competing within the state (IDT presumes that if a service provider could not be compensated for intrastate calls, providing service within the state would be unfeasible.) This would compel the customers from all other service providers to port their service to the state-chosen provider. The impact of losing the ability to provide service within a state could be devastating to a relay service provider and could possibly result in its inability to provide service anywhere at all. Clearly, such an outcome is contrary to Section 225.

In conclusion, there is nothing in 47 U.S.C. §225 that prevents the extension of the Interstate TRS Fund contribution base to include intrastate revenue so that intrastate IP CTS calls can be compensated from the intrastate jurisdiction. Moreover, to further the goals of the ADA – that interstate and intrastate relay services are available in an efficient manner, with compensation based upon jurisdictional separations – the Commission is compelled to quickly transition away from its present methodology and toward a methodology that is consistent with the jurisdictional separations mandate of 47 U.S.C. §225.

Sincerely,

/s/ Carl Billek

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